No. 80-893

In the Supreme Court of the United States

October Term, 1980

GLENN P. KIRKLAND, ET AL.,
Petitioners,

vs.

ARKANSAS-BEST FREIGHT SYSTEM, INC.; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; SOUTHERN CONFERENCE OF TEAMSTERS and CENTRAL STATES CONFERENCE OF TEAMSTERS,
Respondents.

BRIEF OF RESPONDENT, ARKANSAS-BEST FREIGHT SYSTEM, INC., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

R. F. BEAGLE
(Counsel of Record)
RICHARD B. McKELVEY
ROBERT J. HARROP
GAGE & TUCKER
2345 Grand Avenue
P. O. Box 23428
Kansas City, Missouri 64141
(816) 474-6460

THOMAS HARPER
HARPER, YOUNG & SMITH
P.O. Box 43
Fort Smith, Arkansas 72902

Attorneys for Respondent, Arkansas-Best Freight System, Inc.

Of Counsel:
GAGE & TUCKER
HARPER, YOUNG & SMITH

January 2, 1981

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED

In attempting to create an issue for review, petitioners have misstated the basis for the Eighth Circuit's vacation of their damage award as involving an uncertainty in petitioners' proof of the amount of their damages. As the following demonstrates, the Eighth Circuit vacated the damage awards because petitioners failed to prove that their damages were proximately caused by the conduct found to have been in violation of the collective bargaining agreement. Thus the proper question before this Court is as follows:

1. Does plaintiffs' failure to prove the *fact* that their harm was proximately caused by the breach of contract preclude the recovery of damages in suits brought under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a)?

INDEX

Statement of the Case 1
Reason for Denying the Writ 5
Conclusion 10

CITATIONS

CASES

Bangor & A. R. Co. v. Brotherhood of Loc. Fire. and Eng., 442 F.2d 812 (D.C. Cir. 1971) 7
Deboles v. Trans World Airlines, Inc., 552 F.2d 1005 (3d Cir. 1977) 10
Electrical Workers v. Foust, 442 U.S. 42 (1979) 10
Espaillat v. Berlitz Schools, 383 F.2d 220 (D.C. Cir. 1967) 7
James Wood Gen. Trad. Estab. v. Coe, 297 F.2d 651 (2d Cir. 1961) 8
Simon v. New Haven Board & Carton Co., 516 F.2d 303 (2d Cir. 1975) 7
Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) 7, 8

PREVIOUS PAGE WAS BLANK

No. 80-893

In the Supreme Court of the United States

October Term, 1980

GLENN P. KIRKLAND, ET AL.,
Petitioners,

vs.

ARKANSAS-BEST FREIGHT SYSTEM, INC.; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; SOUTHERN CONFERENCE OF TEAMSTERS and CENTRAL STATES CONFERENCE OF TEAMSTERS,
Respondents.

BRIEF OF RESPONDENT, ARKANSAS-BEST FREIGHT SYSTEM, INC., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners' statement of the case contains an outline of the basis upon which the lower courts found and affirmed liability, but fails to mention the findings which the Eighth Circuit concluded necessitated reversal of the damage awards. Although it affirmed the finding that the contract had been breached, the Eighth Circuit vacated all of the district court's damage awards because it could find no evidence that the breach of contract had proximately caused petitioners' harm. In so doing, the Eighth Circuit concluded that petitioners' losses were the inevitable result of a contractually proper change of operations, which would have occurred even if there had been no breach of contract.

For this reason, petitioners' statement of the case must be expanded as follows to include a discussion of the nature of the losses for which the district court awarded damages and the relationship, if any, of these damages to the breach of contract.

In late 1975, Arkansas-Best Freight System, Inc.[1] (hereinafter "ABF") exercised its undisputed contractual right to change its operations by closing its Fort Smith, Arkansas domicile and transferring approximately 40 driver positions from Fort Smith and Little Rock, Arkansas to Dayton, Ohio.[2] As part of the change of operations, all of the affected drivers at Fort Smith and Little Rock were given the opportunity to transfer to Dayton and retain their full seniority. The seniority system in effect at Little Rock and Fort Smith gave the Fort Smith drivers the additional option of transferring to Little Rock with full seniority retention.[3] The change of operations recognized

---

1. Arkansas-Best Freight System, Inc. is a wholly owned subsidiary of Arkansas-Best Corporation. Neither corporation has any subsidiary or affiliated corporations other than wholly owned subsidiaries of Arkansas-Best Corporation.

2. The change of operations was actually more complicated, involving 8 locations and 50 driver positions, as follows:

Losing Terminals		Gaining Terminals	
Little Rock	−25	Dayton	+38
Fort Smith	−14	Cincinnati	+5
St. Louis	−5	Indianapolis	+5
Cape Girardeau	−6	Kansas City	+2

For purposes of this controversy, which only involves claims of drivers at the Little Rock and Fort Smith locations, the change can be simplified to considering only these domiciles and Dayton.

3. By vote of ABF's employees, "modified system seniority" was in effect at ABF's southern conference domiciles. This seniority system permitted an employee, who was unable to work at his present domicile, to transfer with full seniority to any other ABF domicile in the southern conference. Because all three of ABF's proposed changes called for the closing of the Fort Smith domicile, all three proposals were required to and did recognize the modified system seniority rights of the Fort Smith drivers.

this additional right. When the change of operations was actually implemented, 12 Fort Smith drivers declined to exercise their rights under the change of operations and instead exercised their seniority right to transfer to Little Rock. Because these transferees had greater seniority than the drivers who remained in Little Rock, the Fort Smith drivers' exercise of their seniority right caused a reduction in the relative position of the Little Rock drivers on their seniority roster. This reduction in seniority position adversely affected the quantity and quality of the Little Rock drivers' work assignments, which are determined on a seniority basis.[4]

For purposes of the damage awards, the district court divided the plaintiffs into two classes: (1) those who had transferred as a result of the change of operations, and (2) those who had not. The former group was awarded damages representing unreimbursed moving expenses.[5] The latter group, which comprised 67 of the 70 damage awards, was awarded damages for the inconvenience and

---

4. Each of the 12 Fort Smith transferees had sufficient seniority to entitle him to one of the top 20 positions on the Little Rock seniority roster. Thus the vast majority of the incumbent Little Rock drivers were lowered 12 seniority positions. As a result, they were unable to secure certain of the more lucrative work assignments which were awarded to the Fort Smith transferees on a seniority basis.

5. Only one individual, who relocated to Dayton as part of the change of operations, remained as a plaintiff. This individual had already been reimbursed for his moving expenses as required by the contract. He sought and was awarded damages for additional relocation expenses, such as increased home mortgage payments, which were not reimbursable under the contract. Individuals who transferred to Little Rock in exercise of their unique seniority right were not compensated for moving expenses because this transfer was not made as part of the change of operations and thus did not qualify for reimbursement under the contract. Two such individuals, however, sought and received damages for their moving expenses. Consequently, the damages awarded to the plaintiffs in this group represented compensation for expenses which were not recoverable under the collective bargaining agreement.

loss of earnings resulting from their inability to secure the work assignments to which their seniority position had entitled them prior to the transfer of the Fort Smith drivers into Little Rock.[6]

The district court's damage awards clearly represent compensation for the adverse impact of the change of operations itself. The breach of contract, on the other hand, was not the change of operations but rather certain procedural irregularities in the manner in which the contractually proper change of operations was approved. The district court created a causal connection between the adverse impact of the change and the procedural irregularities by "assum[ing] that a properly organized and functioning committee could have come up with a different change of operations plan and one that, presumably, would or might have been more advantageous to the drivers." (Petitioners' Appendix (hereinafter "P.A.") at A52)

The Eighth Circuit vacated the damage awards because it could find "no substantial evidence that would support the assumption of the district court." (*Id.*) According to the Eighth Circuit, "ABF had a right to change its operations by the shift of operational emphasis that has been described." (*Id.* at A51) "[A]ny such change in operations would necessarily involve the transfers of drivers out of Little Rock and Fort Smith." (*Id.* at A51-52) "It was inevitable that the change would have ad-

---

6. There was clearly no uncertainty as to the method to be used in calculating the amount of these damages. The district court ordered that individuals be compensated at the rate of 18¢ per mile for the difference between the miles driven in the two years immediately following the change and the mileage driven in the year immediately preceding the change. In addition, the district court awarded $2,500 per year to each individual who had involuntarily been required to accept a work assignment with variable starting times.

verse economic impacts both on the transferring drivers and on the drivers who remained behind." (*Id.*) Recognizing that the change of operations under any circumstances would have adversely affected petitioners, the Eighth Circuit examined the record to determine the extent, if any, to which this inevitable impact was caused by the procedural irregularities which constituted the breach of the agreement. The Eighth Circuit, however, found "no evidence that the affected drivers were damaged any more by the action of the committee that in fact approved the [change] than they would have been damaged had the [change] been given fair consideration by a properly constituted committee . . . ." (*Id.*) Thus, the Eighth Circuit concluded that petitioners' harm was the inevitable result of contractually permissible conduct, *i.e.*, the change of operations itself, and was not "a proximate result of the particular breaches of contract found by the district court." (*Id.* at A51)

REASON FOR DENYING THE WRIT

When considered in light of the Eighth Circuit's actual holding, it is apparent that the petition for certiorari does not present an issue deserving of review by this Court and should consequently be denied. An examination of the petition clearly indicates that petitioners are relying upon the erroneous premise that the Eighth Circuit vacated the damage awards due to an uncertainty as to the amount of the damages. Thus, in the first question presented, petitioners state the issue as involving "uncertainty as to the *amount* of damages." In the second question, petitioners assume that the damages at issue were "brought about by wrongdoing." In the third question, petitioners continue with their assumption that "they have proven liability and the existence of damages."

In so stating the issues, petitioners have mischaracterized the actual holding of the Eighth Circuit, which vacated the damage awards, not because of any uncertainty as to the amount thereof, but because petitioners had failed to prove the fact that their losses had been proximately caused by the breach of contract. As the Eighth Circuit noted in addressing the damage issue:

> The defendants contend that assuming a breach of contract plaintiffs have failed to show that they sustained any damages as a *proximate result* of the particular breaches of contract found by the distirct court
>
> . . . .
>
> We have given this phase of the case careful consideration and are forced to the conclusion that the defendants are correct in their contention that the plaintiffs failed to prove damages *caused* by the errors in connection with the proceedings before the change of operations committee which the district court found to have been in violation of the NMFA . . . .

(P.A. at A51) Clearly, the Eighth Circuit's concern was not with petitioners' failure to prove the amount of their damage but rather with their failure to prove that the breach of contract proximately caused them any damage at all.

When it is recognized as it must be, that the Eighth Circuit was concerned with the question of causation, it is clear that the petition for certiorari has attempted to create a basis for review by misstating the holding of the lower court. When the Eighth Circuit's holding is properly stated, it is apparent that the decision does not "conflict with the decision of another federal court of appeals on the same matter" and does not depart "from the accepted and usual course of judicial proceedings . . . ." Sup. Ct. Rule

17.1. For this reason the petition presents no issue worthy of review by this Court and should therefore be denied.

The cases cited by petitioners actually acknowledge, rather than conflict with, the principle upon which the Eighth Circuit based its vacation of the damage awards. Thus, in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931), this Court noted that "there is a clear distinction between the measure of proof necessary to establish the *fact* that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. *The rule which precludes recovery of uncertain damages applies to such as are not the certain result of the wrong,* not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." (Emphasis added) Likewise, it has been recognized that "[t]he *Bigelow* [*v. RKO Radio Pictures*, 327 U.S. 251 (1946)] rule that uncertainty as to the *amount* of damages is to be cast on a wrongdoer does not extend to uncertainty as to the *fact* of damages." *Simon v. New Haven Board & Carton Co.*, 516 F.2d 303 (2d Cir. 1975). Clearly, this Court has long recognized that where the plaintiff fails to establish that the breach of contract proximately caused the harm of which he complains, he is not entitled to recover.

The remaining cases cited by petitioners, *Bangor & A. R. Co. v. Brotherhood of Loc. Fire. & Eng.*, 442 F.2d 812 (D.C. Cir. 1971) and *Espaillat v. Berlitz Schools*, 383 F.2d 220 (D.C. Cir. 1967), do not conflict with the Eighth Circuit's holding because neither case involved a situation where the plaintiff had failed to prove that the defendant's conduct had in fact been the cause of the damages awarded. In *Bangor*, the union sought to recover the wages, assessments and union dues that would have been paid by the railroad either to or on behalf of those individuals who

would have been employed had the railroad not breached its contractual obligations. There was no question but that the railroad had breached its agreement and, more significantly, that the breach had resulted in fewer firemen being employed. The railroad avoided any liability for unpaid wages because "in general the law has not yet come to the point of awarding judgments on unjust enrichment for the benefit of a suitor who has not established any harm to himself." 442 F.2d at 821. The court upheld a judgment for unpaid dues and assessments despite the railroad's claim that it was impossible to determine the *amount* of the loss because some of the firemen who would have been hired might have joined a different union. The language, which petitioners assert conflicts with the Eighth Circuit's decision in this case, refers solely to the burden of the parties to prove or disprove the *amount* of the admitted damage. For the reasons noted by this Court in *Story Parchment, supra,* this language has no applicability to a situation where, as here, the proof failed to establish the *fact* that defendant's conduct had proximately caused petitioners' harm. Likewise, in *Espaillat,* the defendant had unquestionably induced the plaintiff to enter into a contract which defendant had then refused to complete. The issue on appeal was not whether defendant's conduct had proximately caused the plaintiff damages, but rather the manner in which the plaintiff was to prove the amount of the damage admittedly caused by the defendant's conduct.

The rule that governs disposition of this case and which was followed by the Eighth Circuit Court of Appeals was stated long ago in *James Wood Gen. Trad. Estab. v. Coe,* 297 F.2d 651 (2d Cir. 1961):

> Damages cannot be based on speculation. The difficulty of measuring and appraising the amount, once

> it is clear that actual damage has been sustained, is another matter. *Where, as here, the existence of any damage whatever would have to be a matter of guesswork, no recovery is allowed* . . . .
>
> Where actual damage depends on an exercise of discretion, and there is no evidence from which it can reasonably be determined how such discretion would be exercised, no damages are recoverable.

Id. at 658 (emphasis added). In reality, petitioners' harm was the inevitable result of ABF's contractually permissible decision to close its Fort Smith domicile. This decision in turn created the Fort Smith drivers' seniority right to transfer to Little Rock. A properly constituted committee operating in strict accord with the procedural rules could not have prevented the closing of the Fort Smith domicile. Neither could such a committee have prevented the Fort Smith drivers from exercising their seniority rights to transfer to Little Rock. Yet it was this transfer, which would have occurred regardless of the breach of contract, that caused petitioners' harm. Moreover, even if one were to ignore the realities of the situation and to assume, as the district court improperly did, that a proper committee in its discretion could have reached a different result, there is clearly "no evidence from which it can reasonably be determined how such discretion would be exercised . . . ." Without knowing what result might have occurred, any determination of damages would have to be a matter of guesswork. Thus, no damages would be recoverable and the Eighth Circuit properly vacated their award.

For the preceding reasons, petitioners' other points are of no consequence when considered in light of the actual holding of the Eighth Circuit. The opinion does not in any way cast doubt on the ability of an individual em-

ployee to obtain relief under § 301 of the LMRA. The Eighth Circuit opinion merely holds that an employee may not redress, under § 301 of the LMRA, injuries which were not caused by the contractually impermissible conduct but instead were the inevitable consequence of contractually permissible actions. Likewise, the Eighth Circuit's opinion does not shift to plaintiff the burden of disproving an affirmative defense. Under § 301, as is the general rule, plaintiff has always had the burden of establishing a causal connection between the damages claimed and the breach of contract. *Electrical Workers v. Foust*, 442 U.S. 42, 48-49 (1979); *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005 (3d Cir. 1977).

CONCLUSION

When petitioners' motion for a writ of certiorari is examined in light of the lower court's actual holding, it is clear that the writ is predicated upon a misconception and should, therefore, be denied. The motion asserts that the writ should be granted because the Eighth Circuit erred by vacating the damage award for uncertainty as to the *amount* thereof. It is apparent, however, that the Eighth Circuit vacated the awards because of uncertainty as to the *fact* that petitioners were damaged as a result of the breach of contract. The law clearly provides that the plaintiff must prove with certainty the fact that he was damaged. A review of the record clearly indicates that the Eighth Circuit was correct in holding that petitioners had failed to prove that the inevitable impact of the permissible change of operations in *fact* resulted from the conduct constituting

the breach. The lower court was clearly correct and the writ of certiorari should be denied.

Respectfully submitted,

R. F. BEAGLE
(Counsel of Record)
RICHARD B. MCKELVEY
ROBERT J. HARROP
GAGE & TUCKER
2345 Grand Avenue
P. O. Box 23428
Kansas City, Missouri 64141
(816) 474-6460
THOMAS HARPER
HARPER, YOUNG & SMITH
P.O. Box 43
Fort Smith, Arkansas 72902
Attorneys for Respondent, Arkansas-Best Freight System, Inc.

Of Counsel:
GAGE & TUCKER
HARPER, YOUNG & SMITH

January 2, 1981